Mr. Leong for the respondent drew my attention to a number of authorities cited in *Mallal's* Supreme Court Practice at page 922. These authorities were decided under section 531 of the Civil Procedure Code (Cap. 7). Section 531 of this repealed Code reads as follows:—

"No appeal shall be brought after the expiration of one month from the time when the decision appealed against was pronounced. Provided that a judge of the Supreme Court may, if he considers that special circumstances render an extension just, give leave to appeal within such extended time after the expiration of such one month as he may think fit." — (the underlining is mine).

Since Order 64 Rule 7 does not contain any clause approximating to the clause underlined in section 531, it would perhaps be better for me to decide independently of those authorities.

In *Ratnam* v. *Cumarasamy & Anor.*(2) Lord Guest in delivering the judgment of the Judicial Committee said, at page 229: —

"The Rules of Court must be *prima facie* obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation."

I find that both the conduct of the appellant company and that of their solicitors to be wholly reprehensible and I am satisfied that there is no material in this application on which I can fairly exercise my discretion in favour of the applicants.

Accordingly I made no order on the motion and awarded costs to the respondent.

No order made.

Solicitors: *K. L. Rekhraj & Co.; Sharikat Kam Woon Wah.*

CHUAN KEAT CHAN LTD. & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) May 8, 1972]

[Ipoh — Criminal Appeal No. 67 of 1970]

Road Traffic — Alleged breach of statutory provision — Goods vehicle issued carrier's licence attached with condition to carry an attendant at the rear of the vehicle — Effect of non-compliance — Road Traffic Ordinance, 1958, ss. 119(iv)(e) and 120(2).

Penal Code, s. 109 — Abetment — Omission to do an act — Requisites.

This was an appeal against the decision of the learned magistrate, Kampar (Perak). A 'C' carrier's licence in respect of a goods vehicle was issued to the first appellant by the Road Transport Licensing Board, which licence was issued subject to the provisions of the Road Traffic Ordinance, 1958, and the rules made thereunder, and to the conditions attached to the carrier's licence. Condition No. 6 of the licence reads as follows:

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic".

The first appellant was charged for failing to comply with condition No. 6, punishable under section 120(2) of the Road Traffic Ordinance, while the second appellant, the driver of the vehicle, was charged with abetting the offence of failing to carry an attendant at the rear of the vehicle, punishable under section 120(2) of the Road Traffic Ordinance, read with section 109 of the Penal Code.

The only evidence led by the prosecution was that on February 18, 1970, the second appellant was stopped by a police officer, who did not find any attendant in the lorry.

Held, allowing the appeal: (1) in order to constitute an offence of abetment by omission, the omission must be an illegal one. In the present case, there is nothing in the Road Traffic Ordinance which casts a duty on the driver of a goods vehicle not to drive the said vehicle without an attendant. The learned magistrate failed to consider what was required of the prosecution to prove a charge under section 109 of the Penal Code;

(2) in the absence of any legislation or rules prescribing the duties of attendants, condition No. 6, in the context in which it appears in the licence, can in no way be said to promote or ensure public interest for the safety and convenience of those who try to overtake the goods vehicles;

(3) there would be an order of acquittal and discharge in favour of both appellants.

Per Sharma J.: "The ability to do a thing is indicative only of the potential and the capability. It does not dictate a duty to transform that capability into the actual performance or action".

Cases referred to:-

(1) *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd.* [1961] 3 All E.R. 641, 657.

(2) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 424.

MAGISTRATE'S CRIMINAL APPEAL.

Lall Singh Mukher for the appellants.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): A 'C' carrier's licence in respect of motor vehicle BK. 6110 was issued to the first appellant by the Road Transport Licensing Board constituted under section 105 of the Road Traffic Ordinance, 1958. This licence was issued subject to the provisions of the Road Traffic Ordinance, 1958 and rules made thereunder and to the conditions attached to the carrier's licence. Condition No. 6 in the licence reads as follows:—

"6. An attendant shall be carried in the rear of the vehicle, so placed that he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic."

On February 18, 1970, the second appellant was the driver of lorry BK. 6110. P.W.1, Mohamed Yusoff bin Abas, Sgt. 7356 stopped this lorry at the 22nd milestone Ipoh-Kampar Road and did not find any attendant in the lorry. The charge against the first appellant was for failing to comply with condition No. 6 attached to the carrier's licence granted to it which, according to the charge, was punishable under section 120(2) of the Road Traffic Ordinance. The charge against the second appellant was for abetment of an offence of failure to carry an attendant at the rear of the lorry punishable under section 120(2) of the Road Traffic Ordinance read with section 109 of the Penal Code. The only evidence led by the prosecution was that P.W.1 stopped the lorry and did not find any attendant in it and that he took down the particulars of the driver and the owner. The prosecution did not go any further than that.

I will deal with the charge against the second appellant first as it is the simpler of the two charges to deal with. Section 107 of the Penal Code defines "abetment". It reads:

"107. A person abets the doing of a thing who —

First — Instigates any person to do that thing; or

Secondly — Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly — Intentionally aids, by any act or illegal omission, the doing of that thing."

There was no evidence of any instigation by the second appellant nor of any conspiracy between the two appellants. The only part of section 107 which could if at all apply would be the third clause thereof. In order however to constitute an offence of abetment by omission, the omission must be an illegal one. In other words, there must be a duty to act. The words "illegal omission" in the third clause of section 107 have reference to an intention of "aiding the doing of a thing." There seems nothing in our legislation which casts a duty on the driver of a goods vehicle not to drive the said vehicle without an attendant. There was consequently no evidence of abetment against the second appellant. The learned magistrate failed to consider what was required of the prosecution to prove a charge under section 109 of the Penal Code. The charge was not for using a goods vehicle without there being an attendant on it as required by one of the conditions of the licence granted to the first appellant but was a charge for abetment. The appeal of the second appellant is consequently allowed and the order of the learned magistrate set aside and conviction quashed. The fine, if paid, is to be refunded to him.

Coming now to the charge against the first appellant, the essence of the charge against him was the failure to comply with condition No. 6 attached to the licence referred to and quoted above. Section 118(1)(a) deals with the power of the Licensing Board to grant or refuse an application for a licence or for its variation. Section 118(1)(b) refers to the power to grant a licence in respect of motor vehicles other than those involved in the application and section 118(1)(c) with the power to grant a licence of a different class from that specified in the application. In short the whole of sub-section (1) of section 118 deals with the power to make an order granting or refusing an application for a licence or varying the said licence or any of its conditions. Section 118(2) deals with how the Licensing Board is to exercise its discretion under section 118(1). It reads —

"(2) The Licensing Board in exercising its discretion under this section shall have regard primarily to the interests of the public generally, including those of persons requiring as well as those of persons providing facilities for transport whether by road, rail, water or air, and in so doing shall have particular regard to the following matters:

...."

The word "primarily" appearing in sub-section (2) is significant as it requires the board to have paramount or foremost regard to the public interest generally. Again in sub-section (3) of section 118 the words "after having regard to the above matters that such grant or variation is conducive to the interests of the public as aforesaid" appear. It is section 119, however, of the Road Traffic Ordinance which authorises the Licensing Board to attach to the licence such conditions which it thinks fit provided those conditions:

(a) are not opposed to or inconsistent with any of the provisions of Part V of the Ordinance, and

(b) they are only in respect of matters *which it is required to have regard to* under section 118.

The Licensing Board is further subject to (a) and (b) above authorised to attach such conditions as should secure the objects referred to in section 119(i) to (iv). Any condition in the licence which safeguards or secures public interest is therefore within the ambit of the powers of the Licensing Board. The word "securing" used in section 119 is in relation to the object for which the condition in the licence is imposed. It should be such as ensures or succeeds in the achievement of the object. As far as this appeal is concerned, the only part of section 119 which could make condition No. 6 relevant is section 119(iv)(e). The condition therefore has to be such as can ensure or succeed in the safety and convenience of passengers on vehicles and persons on roads including those who use the road in any motor vehicle.

The words "carried", "can" and "so placed" appearing in condition No. 6 are very significant. A "passenger" is defined in the Road Traffic Ordinance and the definition reads as follows:—

" 'passenger' in relation to a person carried on a public service vehicle does not include the driver or conductor or any ticket inspector on the vehicle in pursuance of his duties, and in relation to persons carried on a goods vehicle does not include the driver or any attendant required by law to be carried on such vehicle;"

I have been unable to find any law which requires an attendant to be carried on a goods vehicle. I asked both the learned deputy and the appellants' counsel if there in fact was a law which required an attendant to be carried on a goods vehicle and I have been assured that no written law exists to that effect in our country. The learned deputy, however, qualified his statement by saying that it is only by implication and by virtue of the condition imposed in the licence that an attendant is required on a goods vehicle. An attendant is a person who owes a duty of service to another or is one who attends, *i.e.*, waits to serve. It appears that no rules have so far been made prescribing the duties of an attendant. It was a matter for the rule-making authority to prescribe rules defining the duties of attendants on goods vehicles. As they do not seem to have thought it fit to make such rules, my duty is to interpret and enforce the law as it exists and not as it ought to be. The word "carried" in condition No. 6 only means "transported". The words "so placed" appearing in the said condition are capable of only the meaning that the attendant should be put in such a position from where "he can signal to overtaking traffic, and to the driver of the vehicle the approach of such traffic" and the word "can" merely denotes "the ability or power to accomplish something." Condition No. 6 therefore only requires the licence holder to have in the rear of the vehicle a person namely "an attendant" who should be so put or lodged, whether seated or standing (and who

could be of any age or sex) in such a position in the vehicle from which point he could be said to possess the ability or power to give a signal to overtaking traffic or to the driver of the vehicle of the approach of overtaking traffic. The ability to do a thing is indicative only of the potential and the capability. It does not dictate a duty to transform that capability into the actual performance or action. As I said in the course of arguments, a young woman may have the ability or potential to give birth to a child but that is totally different from the act of giving birth. The potentiality is inert, performance active.

It is a common spectacle on our roads to find heavily laden lorries carrying an extra load in the shape of a sleeping person at the rear on top of the goods or luggage. Sometimes even infants, boys and girls alike, are seen stationed at the rear of the lorries as mere static symbols of due compliance with the law or the condition of the licence.

The power vested in the licensing authority under section 119 to attach a condition to the licence is meant to serve the purpose of "securing" as far as section 119(iv)(e) of the Road Traffic Ordinance is concerned, the safety and convenience of all road users. The condition has to be related to the purpose and if it is divorced from the purpose or is incapable in its context to serve the purpose for which alone the power to fasten a condition is conferred on the Licensing Board, the condition so imposed is outside the scope and ambit of the authority which the legislature intended to confer on the Licensing Board and is to that extent invalid. In the absence of any legislation or rules prescribing the duties of attendants, condition No. 6 in the context in which it appears in the licence granted to the first appellant can in no way be said to promote or ensure public interest for the safety and convenience of those who try to overtake the goods vehicles.

A statutory power to impose conditions even though expressed in the widest terms is subject to certain well defined limitations and one of such limitations is that the condition must be such as fairly falls within the ambit of the statute. The construction of a statutory power to impose conditions is to be approached in the same way as that of a power to make bye-laws. The court is bound before reaching a decision on the question whether a regulation, bye-law or condition is *intra vires* to examine the nature, objects and scheme of an Act as a whole and in the light of that examination to consider exactly what is the area over which powers are given by the section under which a competent authority purports to act.

In *Commissioners of Customs and Excise* v. *Cure & Deeley, Ltd.*[1] it was observed by Sachs J:

"In the first place I reject the view that the phrase 'appear to them to be necessary' when used in a statute conferring powers on a competent authority, necessarily makes that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have. It is axiomatic that, to follow the words used by Lord Radcliffe in *A.-G. for Canada* v. *Hallet & Carey, Ltd.* [1952] A.C. 449 'the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention.' It is no less axiomatic that the application of that rule may result in identical phrases receiving quite different interpretations according to the tenor of the legislation under consideration. As an apt illustration of such a result it is not necessary to go further than *Liversidge* v. *Anderson* [1941] 3 All E.R. 338 and *Nakkuda Ali* v. *M.F. de S. Jayaratne* [1951] A.C. 66 in which cases the words 'reasonable cause to believe' and 'reasonable grounds to believe' received quite different interpretations. To my mind a court is bound before reaching a decision on the question whether a regulation is *intra vires* to examine the nature, objects, and scheme of the piece of legislation as a whole, and in the light of that examination to consider exactly what is the area over which powers are given by the section under which the competent authority is purporting to act. In taking that view I respectfully apply the line of approach adopted by Lord Greene, M.R., in the cases previously cited, where he referred to the need for the acts of the competent authority to fall within the four corners of the powers given by the legislature. It is also to be noted that the observations of Lord Greene in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* [1943] 2 All E.R. 547 which were relied on by counsel for the commissioners were confined to 'regulations of this character', a phrase which in the context can refer only to emergency legislation."

The courts, in the words of Farwell L.J. in *Dyson* v. *Attorney-General*,[2] are the only defence of the liberty of the subject against departmental aggression. The appeal by the first appellant is also allowed. The order of the learned magistrate is set aside and the conviction quashed. The fine, if paid, is to be refunded to him. There will be an order of acquittal and discharge in favour of both the appellants.

Orders accordingly.

Solicitors: *Lovelace & Hastings.*

RE ABDUL WAHAB; *EX PARTE* UNITED MALAYAN BANKING CORPN. BHD.

[O.C.J. (Sharma J.) May 9, 1972]

[Ipoh — In Bankruptcy No. 177 of 1971]

Bankruptcy — Petition — Withdrawal of, after being presented — Leave to — Discretion of court — Bankruptcy Act, 1967, s. 6(7).

Where there is no evidence before the court that the debtor has no other creditors the application to withdraw the petition would be refused.

Section 6(7) of the Bankruptcy Act, 1967 enacts that a creditor's petition, after it has been presented, cannot be withdrawn without the leave of court... The court has a discretion in the matter of granting leave for the withdrawal of the petition. Each case has to be considered on its merits. In considering the applications under section 6(7) of the Bankruptcy Act, it is the duty of the court to see whether the interests of the general body of the creditors would be served or not by the grant of the application. The mere fact that the debtor has settled with the creditor is not enough for granting such leave. The creditor has no right to get his debtor adjudicated a bankrupt and pending such adjudication to receive from him the sum in adjustment of his claim as he is not entitled to use the petition as a lever to secure preferential treatment for himself.

PETITION.

K. C. Chin (Miss) for the petitioning creditors.

Judgment-debtor absent.

Sharma J. (delivering oral judgment): The judgment-debtor in this case has been served by substituted service which became effective on 25th April, 1972. The debtor is absent. The petitioning creditors, however, have now applied for leave to withdraw the